



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 108 of 2010**

**DR. WILSON KIPKORE ..... PLAINTIFF**

**VERSUS**

**HILLARY ROTICH ..... DEFENDANT**

**RULING**

1. The chamber summons dated 4<sup>th</sup> April 2010, is brought under the provisions of **Order 3 Rule 9A Order, 9A Rule 10, and 11, Order 49 Rule 5 of the Civil Procedure Rules, section 3A of the Civil Procedure Act**. The defendant/ applicant is seeking for orders that the Interlocutory Judgment entered against him on 7<sup>th</sup> April 2010 and any other consequential orders be set aside. He is also seeking for an order of stay of execution pending the hearing and determination of the application and also to be granted leave to file a defence out of time.

2. This application is supported by the grounds stipulated on the body thereto, and the matters deposed to in the affidavit of the defendant sworn on 4<sup>th</sup> April 2010. Briefly stated, the defendant argues that he has a good defence which raises triable issues and he ought to be allowed to defend this suit on merit. The defendant contends that failure to file a defence within the prescribed period was inadvertent. He was served with summons to enter appearance on 24<sup>th</sup> March 2010, and he instructed the firm of **Ombeta and Associates** to defend him. On 29<sup>th</sup> March 2010, the firm of Ombeta and Associates filed a Memorandum of Appearance. On 27<sup>th</sup> April 2010, he enquired whether a defence had been filed on his behalf and he was informed that the defence had not been filed. However the next day he was informed that when the Advocates went to file a defence, they found an interlocutory judgment had been entered on 27<sup>th</sup> April 2010. That is when he withdrew instructions and instructed **Messrs Owino & Owino Advocates**. The applicant contends that the plaintiff paid one Deepak Kamani and Mansum Motors of Dubai in the United Arab Emirates. Moreover the money was paid in Kenya shillings and not in dollars as claimed, thus the defendant has a strong defence which raises triable issues.

3. This application was opposed by the plaintiff; Counsel relied on the replying affidavit sworn on 20<sup>th</sup> May 2010. According to counsel for the respondent, for the applicant to succeed to set aside a regular judgment, the defendant must show that the delay in filing the defence was excusable and that the defence raises triable issues. In this case the summons was served upon the defendant who instructed a firm of advocates and he entered appearance but for non explained reasons, failed to file a defence. There is no explanation offered why no defence was filed.

4. On the issue of there being a defence that raises triable issues, the plaintiff has attached documents to show how he deposited money on account of the defendant. These deposits were done in Kenya currency because transactions in Kenya are carried out in Kenya currency. Counsel urged the court to find there are no triable issues because the defendant owes the plaintiff the sum claimed.

5. Under **Order IX (a) r10 of the Civil procedure Rules** it is provided as follows:-

*“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”*

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In the case of **Ceneast Airlines Ltd v Kenya Shell Ltd East African Law Reporting [2000] 2 EA 362(CAK)** the Court of Appeal adopted a passage by **Duffus Pe** in the case of **Patel v East Africa Cargo Handling services 1974 EA** as follows:-

*“The main concern of the court is to do justice to the parties, and the court will not impose conditions in itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it ‘a triable issue’ that is an issue which raises a prima facie*

*defence and which should go to trial for adjudication”*

6. The issues for determination is whether there are good reasons why the court should set aside a regular judgment and whether the defence raises triable issues and lastly whether the plaintiff can be reasonably compensated for the prejudice caused by way of costs. It is not in dispute that this was a regular judgment because the defendant was served with summons to enter appearance. There is no cogent explanation given by the defendant or his advocate why they failed to file a defence after filing a Memorandum of Appearance, there is no explanation offered by that firm of advocates.

7. On the issue of there being triable issues raised by the defence, the defendant merely denies having been contracted to import a motor vehicle for the plaintiff and denies having received US\$ 7000 from the plaintiff. On the other hand the plaintiff exhibited cash deposit receipts for monies deposited in the defendants account. The defendant did not show his own statement of account to show that the money was not received in his account. The defendant has also sought for an order for stay of execution. For a party to succeed in an application for stay of execution **Order XLI Rule 4(2)** provides that:-

*“2. No order for stay of execution shall be made under sub rule (1) unless-*

*1. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*2. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”*

8. The applicant has not satisfied the above conditions especially no security is provided in accordance with the law. Accordingly, I find no merit in this application. There are no justifiable reasons why the plaintiff did not file the defence within the stipulated period. If he had instructed counsel who failed to file a defence no reasons are given by Ombeta & Associates who had filed the Memorandum of Appearance on 29<sup>th</sup> March 2010. However, purely in the interest of proportionality this court will grant the orders sought **on condition** that the Defendant will deposit the entire sum of **ksh. 9,990,867.20** (the sum claimed in the plaint) within thirty (30) days in an interest earning account to be held by joint Advocates, until this suit is determined. In default the application will stand dismissed. The plaintiff will have the costs of this application.

**RULING READ AND SIGNED ON 2<sup>ND</sup> JULY 2010 AT NAIROBI.**

**M.K. KOOME**  
**JUDGE**